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SECOND JUDICAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

UTAH DIVISION OF CONSUMER PROTECTION, Plaintiff, v. **PERFORMAX GYMS, INC.**, a Utah corporation; and **BAILEY NOLAN HALL** Defendants.	**PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE, AND OTHER EQUITABLE RELIEF, AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE, AND MEMORANDUM IN SUPPORT** Case No. 160700827 Judge: Robert J. Dale

Pursuant to UT R. Civ. P. 65A, Plaintiff Utah Division of Consumer Protection (the "Division"), hereby applies for a Temporary Restraining Order with Asset Freeze and other equitable relief ("TRO"). Proposed orders are filed concurrently herewith.

1. As the Division's accompanying Memorandum details, this case involves the closure of Performax gym in Clearfield, Utah. The gym closed abruptly without notice to the

Division or to its hundreds of members. The gym members purchased memberships but have been left with no services, and they continue to be billed for the services after the gym's closure. Entering the proposed TRO is the only way to protect the members' legal right to restitution.

2. Defendants Performax Gyms, Inc. and Bailey Nolan Hall are violating Sections 13-11-4 and 13-11-5 of the Utah Consumer Sales Practices Act ("CSPA"), and Section 13-23-5 of the Health Spa Services Protection Act ("HSSPA"), as well as the rules promulgated thereunder.

3. As the accompanying Memorandum explains, the Division is likely to prevail against the Defendants, and the balance of the equities strongly favors the requested relief.

4. To stop ongoing unlawful conduct, to prevent further injury, and to protect the victims' right to the restitution that the law permits, the Division respectfully requests that the Court grant its Application.

MEMORANDUM IN SUPPORT

Plaintiff, the Utah Division of Consumer Protection ("Division"), presents its Memorandum in Support of Application for TRO. The Division is submitting this Memorandum contemporaneously with its Verified Complaint for Injunction and Other Relief ("Complaint") alleging violations of the Consumer Sales Practices Act ("CSPA") and the Health Spa Services Protection Act ("HSSPA") and seeking relief from and against Performax Gyms, Inc. ("Performax"), and Bailey Nolan Hall ("Hall") (jointly "Defendants").

This action involves the closure of the Performax gym in Clearfield, Utah. The gym closed abruptly without notice to the Division or to its members. Hundreds of Utah consumers who purchased gym memberships from Performax have been left with no services; services for

which they had paid. To add insult to injury, Performax and other entities controlled by Bailey Hall continue to bill Utah consumers for services, and to initiate collection efforts. Performax's website continues to offer gym memberships for sale without informing consumers of its closure; Performax has been evicted from the property and a creditor is in the process of repossessing its gym equipment. Despite the Division's attempts to obtain records from Defendants, they have not provided important documents to the Division.

STATEMENT OF FACTS

1. Performax is a gym registered with the Division operating in Davis County, Utah. Blaylock Decl. Att. A.
2. As of September 29, 2015, Performax reported to the Division that it had 1,722 active contracts. Blaylock Decl. Att. A, p.6.
3. In or about April 2016, eviction proceedings were filed against Performax and others, Case No. 160700378 in Utah Second District Court, Davis County by AMRA Enterprise, LLC, the property owner where the gym is located. Blaylock Decl. ¶11.
4. In or about April 2016, a Performax creditor, Continental Bank, commenced legal proceedings based upon Performax's failure to make payments on a loan secured by gym equipment located at the Performax facility. *Continental Bank v. Performax Gyms, Inc. et al.,* Case No. 160700343, Utah Second District Court, Davis County. Blaylock Decl. ¶¶17, 21.
5. On or about June 16, 2016, the Court in Performax's eviction proceeding issued a Writ of Execution, ordering Performax to vacate the premises. Blaylock Decl. ¶11.
6. On or about June 24, 2016, Performax abruptly ceased operations upon being evicted

pursuant to the Writ of Execution. Blaylock Dec. ¶6; Heward Decl. Att. A.

7. On or about July 1, 2016, the Continental Bank in Performax's loan default case filed a motion for a Writ of Replevin in which the bank sought Court approval to seize exercise equipment in the gym. The Writ of Replevin issued on July 1, 2016 and was made permanent on July 19, 2016. Blaylock Decl. ¶¶17, 21.

8. Upon information and belief, Performax owes approximately $429,922.11 in unpaid rent for the gym's premises. Blaylock Decl. ¶15.

9. Performax has ceased operations for a period exceeding ten consecutive business days. Blaylock Decl. ¶18, Att. D; Heward Decl. ¶20.

10. Prior to cessation of operations, Performax did not notify the Division of its intent to cease operations. Heward Decl. ¶¶9, 29.

11. Performax maintained a page on the social media site Facebook, www.facebook.com/performax gyms. Performax also maintained a website, http://www.performaxgyms.com.[1] Blaylock Decl. ¶¶6-7, 18-19, Atts. D, E; Heward Decl. ¶¶4, 7-8, 20.

12. In response to a consumer inquiry, a Division investigator reviewed Performax's Facebook page on June 28, 2016. That page reflected that Performax had closed on June 24, 2016 and that law enforcement officers had been present during the closure. Blaylock Decl. ¶6.

13. A post reviewed by the Division's investigator indicated that:

> The best way to cancel is through me alex@performaxgyms.com... Please write on the subject line your full name and last name and best number to reach you… I

1 This page has since been taken down from the Internet.

> will take care of every single one of you. Don't bother calling National [Fitness] I will resolve every issue if the Third Party Processor releases the money… We have requested an "EMERGENCY HEARING" with the courts… Let's keep our faith above all…

Blaylock Decl. ¶7, Att. D, p.6; Heward Decl. ¶8.

14. Additional posts reviewed by the Division investigator reflect that consumers requested to cancel their membership, receive a refund and/or to stop continued billing for gym memberships. Blaylock Decl. ¶8, Att. D, p.6; Heward Decl. ¶7.

15. On July 7, 2016, the Division investigator reviewed Performax's website and observed that the website continued to offer gym memberships for sale, despite the gym's closure. Blaylock Decl. ¶19, Att. E.

16. Utilizing a prepaid credit card and an alias, the Division investigator entered into an online purchase of a Performax gym membership. Blaylock Decl. ¶19, Att. E.

17. The Division investigator received a confirmation email from Performax and the charge was completed and fully processed on July 9, 2016. The charge for the purchase of the gym membership was reflected as "Performax Gyms Inc. 801-825-7629, UT 90561704." Blaylock Decl. ¶19, Att. E.

18. Under the terms of the contract entered into between the Division investigator and Performax, cancellation with a 3-day right of rescission period was to be done by physically delivering or sending a written notice of cancellation by certified mail to the gym's physical address. Blaylock Decl. ¶19, Att. E.

19. At the time the contract was entered into, the gym was closed, an eviction proceeding had been commenced, and mail was not being delivered to the premises. Blaylock Dec. ¶¶6, 19, Att. E; Heward Decl. Att. A.

20. On August 8, 2016, the Division investigator again reviewed Performax's website, observed it continued to offer gym memberships for sale, and completed another undercover membership purchase. Blaylock Decl. ¶24, Att. I.

21. As previously, the Division investigator received a confirmation email from Performax, and saw the charge as "pending." Blaylock Decl. ¶24, Att. I.

22. Again, under the terms of the contract entered into between the Division investigator and Performax, cancellation with a 3-day right of rescission period was to be done by physically delivering or sending a written notice of cancellation by certified mail to the gym's physical address. Blaylock Decl. ¶24, Att. I.

23. At the time the contract was entered into, the gym was closed, an eviction proceeding had been commenced, and mail was not being delivered to the premises. Blaylock Dec. ¶¶6, 19, Att. E; Heward Decl. Att. A.

24. The Division investigator issued a subpoena to Performax and Hall requesting the production of gym membership records, including contact information, contracts and billing information for each active member as of June 1, 2016. The Division also sent a subpoena requesting the same information to National Fitness Financial. The subpoena requested the records be delivered within 30 days. Blaylock Decl. ¶¶14, 34, Att. C.

25. To date, the Division has received no response to the subpoena and no records from Performax or Hall. Blaylock Decl. ¶¶14, 34.

26. On July 27, 2016, the Division sent a cease and desist letter to Performax and Hall, advising them that it was unlawful to, among other things:

> * Fail to adhere to provisions of the *Health Spa Services Protection Act* and Administrative Rules;

* Fail to respond to the subpoena;
* Bill consumer's membership dues after the gym's closure on June 24, 2016; and
* Enter into new membership contracts online after the gym's closure on June 24, 2016.

Blaylock Decl. ¶22, 34, Att. G.

27. To date, no response has been received to the letter. Blaylock Decl. ¶22, 34.

28. As a consequence of Defendants' failure to respond to the subpoena and comply with Utah law, the Division is unable to calculate restitution to consumers, analyze contracts and contact all affected consumers. Blaylock Decl. ¶34; Heward Decl. ¶29.

29. To date, the Division has received approximately 198 consumer complaints related to Performax gym memberships. Blaylock Decl. ¶25; Heward Decl. ¶25.

30. Consumers complain that Performax is continuing to bill monthly membership dues, personal training services, and semi-annual membership fees, even after the gym closed in June 2016. Blaylock Decl. ¶¶25-35, Att. J; Heward Decl. ¶¶25-28.

31. Upon information and belief, Performax owes thousands of Utah consumers prorated refunds for untendered services and full refunds for billing that has occurred after June 24, 2016. Blaylock Decl. ¶32; Heward Decl. ¶27.

32. According to the information contained in the consumer complaints received by the Division, Performax has profited an estimated $85,273.44 per month from billing that occurred after the gym's closure. Blaylock Decl. ¶33; Heward Decl. ¶28.

33. Consumer losses are ongoing. Every day Performax and Hall receive funds from consumer for services that are not furnished. Blaylock Decl. ¶33; Heward Decl. ¶28.

34. Consumers are beginning to receive collection notices from Defendants and others acting

in concert with them for gym membership services that are not being provided. Consumers fear that their credit may be adversely affected by these notices. Blaylock Decl. ¶26, Att. L.

ARGUMENT

I. RELIEF IS NEEDED TO PROTECT UTAH CONSUMERS AND IN THE PUBLIC INTEREST

A preliminary injunction is an equitable remedy, and it is within the discretion of this Court to grant or deny the relief requested based on its consideration of the evidence presented in light of relevant legal factors. *See Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 90 (Utah 1992); *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983).

As of the filing of this Application, the Division has received a total of 198 complaints from consumers who have failed to receive purchased services from the Defendants, and who have continued to be billed for services not provided. As discovered by Division investigators, as recently as August 8, 2016, individuals are able to purchase services through the Defendants' website.

Under the CSPA, the Division may bring an action,

> *to enjoin, in accordance with the principles of equity*, a supplier who has violated is violating , or is otherwise likely to violate this chapter; and to recover . . . actual damages, *or obtain relief under Subsection (2)(b)*, on behalf of consumers who complained to the [Division] within a reasonable time after it instituted proceedings under this chapter.

Utah Code Ann. § 13-11-17(1) (emphasis added). The Defendants meet the definition of "supplier" because they sell, regularly solicit, or engage in consumer transactions, either directly or indirectly. Utah Code Ann. § 13-11-3(6). The relief provided under Subsection (2)(b) includes an order,

(A) To reimburse consumers found to have been damaged;
(B) To carry out a transaction in accordance with consumer' reasonable expectations;
(C) To strike or limit the application of unconscionable clauses of contracts to avoid and unconscionable result; or
(D) To grant other appropriate relief.

Utah Code Ann. § 13-11-17(2)(b) (emphasis added). Additionally, under the HSSPA, the Division may "file an action for injunctive relief, damages, or both to enforce this chapter." Utah Code Ann. § 13-23-7(1).

Because there is substantial risk to consumer funds under the Defendants' control and a risk to any individuals currently contemplating the purchase of services from the Defendants, a temporary restraining order and order freezing assets are necessary to protect the public interest. Absent this relief, the Defendants' violations are likely to continue.

II. THE DIVISION CAN ESTABLISH THE NECESSARY GROUNDS FOR PRELIMINARY RELIEF

In most cases, the district court may issue a restraining order or preliminary injunction if the applicant establishes four elements:

> (1) '[t]he applicant will suffer irreparable harm unless the order or injunction issues';
> (2) '[t]he threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause to the party restrained or enjoined';
> (3) '[t]he order or injunction, if issued, would not be adverse to the public interest'; and
> (4) '[t]here is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.' Utah R. Civ. P. 65A(e).

Zagg, Inc. v. Harmer, 2015 UT App 52, ¶ 5, 345 P.3d 1273, 1274 (paragraphing modified for clarity). These four elements, taken from the Utah Rules of Civil Procedure, are a reformulation of what is sometimes called the "the "Dataphase test," and are in common use in federal courts,

including by express incorporation in the Tenth Circuit. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (cited by the Advisory Committee as the basis for Utah R. Civ. P. 65A); *see also MonaVie, LLC v. Wha Lit Loh*, No. 2:11-CV-265 TS, 2011 WL 1233274, at *3 (D. Utah Mar. 31, 2011); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Not only did federal law serve as the genesis for the current standard in Utah, it is still useful in the application of the standard. As the Advisory Committee Note to Rule 65A explains, "[t]here is little case law in Utah interpreting the grounds for injunctive orders, and… [t]he substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e)." Utah R. Civ. P. 65A Advisory Committee Note.

The Federal Trade Commission Act ("FTCA") provides a statutory basis for the Federal Trade Commission ("FTC") to seek and obtain injunctive relief for deceptive acts and practices upon consumers where, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C.A. 53(b). Thus, FTC actions carry a statutorily imposed standard which places a lighter burden on the Commission than that imposed on private litigants by not requiring that the Commission show irreparable harm to obtain a preliminary injunction.[2] "As irreparable harm is presumed in a statutory enforcement action, the district court need only find some chance of probable success on the merits." *F.T.C. v. Skybiz.com, Inc.*, No. 01-cv-396-K(E), 2001 WL 1673645, at *8 (N.D.Okla. Aug. 31, 2001) *aff'd* 57 Fed.Appx 374 (10th Cir. 2003) (citing *F.T.C. v. World Wide Factors,*

2 *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-347 (9th Cir. 1989) ("the district court is required (i) to weigh equities; and (ii) to consider the FTC's likelihood of ultimate success before entering a preliminary injunction"); *Id.* at 347 ("Because irreparable injury must be presumed in a statutory enforcement action, the district court need only to find some chance of probable success on the merits.")(quoting *U.S. Odessa Union Warehouse Co-op*, 833 F.2d 172 at 176

LTD., 882 F.2d 344, 347 (9th Cir.1989)). "Balancing the equities tips in favor of the public interest in issuing such relief to federal agencies like the FTC." *Id.* citing *World Wide Factors, LTD*., 882 F.2d at 347. The FTC standard is broadly influential in this space, and aligns with law offering presumptions or modifications to the general requirements for injunctive relief that are commonly granted when injunctive relief is sought under statutory authority, and which the Division argues should be applied in the present matter.

A. THE DIVISION IS LIKELY TO SUCCEED ON THE MERITS AGAINST THE DEFENDANTS

Under Utah law, and federal case law relating to FTC actions, to "meet the requirements of [factor] four, an applicant must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved." *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 8, 974 P.2d 821, 822; *Skybiz.com, Inc.*, No. 01-cv-396-K(E), 2001 WL 1673645, at *8 (Stating that F.T.C. may show probable success on the merits by "a prima facie showing of illegality.").

i. DEFENDANTS VIOLATED SECTION 4 OF THE CSPA BY FAILING TO PROVIDE SERVICES

Under the CSPA,

> a supplier commits a deceptive act or practice if the supplier knowingly or intentionally… (l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:
>
> (i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund; . . .

Utah Code Ann. § 13-11-4(2)(l).

The gym closed on or about June 24, 2016. Blaylock Decl., ¶6, Att. D, p.9; Heward Decl. ¶5, Att. A, p.1. Performax has no other locations, and has no affiliations allowing Performax members to use other facilities. At the time of Performax's most recent registration renewal with the Division, filed September 29, 2015, Performax reported 1,722 active consumer contracts, and the Division estimates Performax had 1,500 to 3,000 active consumer contracts at the time of closure. Blaylock Decl., ¶32, Att. A, p.6; Heward Decl., ¶27.

To date, the Division has received 198 consumer complaints against Performax, representing a fraction of the 1,500 to 3,000 active memberships the Division estimates Performax had at closure. Blaylock Decl., ¶¶25-32, Att. J, Att. A; Heward Decl., ¶¶20, 25-27. These complaints consistently describe that consumers paid Defendants for access to the gym, but could not make use of the facility because it was closed. Further, many of these consumers describe recurring monthly charges Defendants continued to assess against them even after the gym had closed. *Id*.

Defendants accepted payment from consumers for access to the gym, but failed to furnish access to the facility as promised, and then continued billing consumers for access to the facility after it had closed. There can be no question that Defendants committed deceptive acts and practices in violation of the CSPA by receiving payment for services then failing to furnish those services as represented. Utah Code Ann. § 13-11-4(2)(l).

ii. DEFENDANTS VIOLATED THE CSPA BY MISREPRESENTING THE AVILIABILITY OF SERVICES

The CSPA provides that "[a] deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the

transaction." Utah Code Ann. § 13-11-4(1). By its own terms, the CSPA is to be "construed liberally… to protect consumers… [and] to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection…" Utah Code Ann. § 13-11-2, (2), (4).

The gym closed on or about June 24, 2016. On July 7, 2016, twelve days after the facility closed, a Division investigator confirmed that memberships were being offered on Defendants' website, and completed the purchase of a gym membership. Blaylock Decl. ¶19, Att. E. On August 5, 2016, forty-two days after the gym closed, the Division investigator confirmed memberships were still being offered on Defendant's website, and completed the purchase of another gym membership. Blaylock Decl. ¶24, Att. I.

Well after the gym closed, Defendant's website continued to represent that Performax was a going concern, open to current and prospective consumers for their use. Blaylock Decl. ¶¶19, 24, Atts. E, I. In truth, Defendants had no capacity to make space or equipment available to consumers as represented on the website. Pursuant to an eviction proceeding, Performax was ordered to vacate its premises on June 16, 2016. Blaylock Decl. ¶12. Additionally, pursuant to an action by a secured creditor, the equipment in use at Performax was made subject to a writ of replevin made permanent on July 19, 2016. Blaylock Decl. ¶21.

To date, the Division has received 198 consumer complaints against Performax, representing a fraction of the 1,500 to 3,000 active memberships the Division estimates Performax had at closure. These complaints consistently allege that Defendants have continued billing consumers for access to the gym, despite the fact that it is closed. By continuing to bill consumers as though the gym were available for their use, Defendants implicitly claim such to be

true. As the facility is closed, this misrepresents the nature of Defendants' business to consumers.

iii. DEFENDANTS VIOLATED SECTION 5 OF THE CSPA BY SELLING AND BILLING FOR GYM MEMBERSHIPS DESPITE THE GYM BEING CLOSED

Section 5 of the CSPA prohibits unconscionable acts and practices by suppliers.

> The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.
> In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

Utah Code Ann. § 13-11-5. Case law clarifies that, under the CSPA, "substantive unconscionability [] occurs when conditions 'oppress or unfairly surprise an innocent party.'" *Gallegos v. LVNV Funding LLC*, No. 2:14-CV-516-DAK, 2016 WL 917930, at *6 (D. Utah Mar. 10, 2016); citing *Wade v. Jobe*, 818 P.2d 1006, 1016 (Utah 1991).

The gym closed on or about June 24, 2016. On July 7, 2016, twelve days after the gym closed, a Division investigator confirmed that memberships were being offered on Defendant's website, and completed the purchase of a gym membership. Blaylock Decl. ¶19, Att. E. The investigator was charged $42.63 for the membership, with the charge bearing the name ""Performax Gyms Inc. 801-825-7629, UT 90561704." *Id*. On August 5, 2016, forty-two days after the gym closed, the Division investigator confirmed memberships were still being offered on Defendant's website, and completed the purchase of another gym membership. Blaylock Decl. ¶24, Att. I. The investigator was charged another $42.63 for this membership, with the charge bearing the name "Performax Gyms Inc. 424760." *Id*.

Any reasonable consumer would be "unfairly surprised" to, after completing the

seemingly legitimate purchase of a gym membership on the internet, then find the gym had been permanently closed even before the purchase.

To date, the Division has received 198 consumer complaints against Performax, representing a fraction of the 1,500 to 3,000 active memberships the Division estimates Performax had at closure. These complaints consistently allege that consumers were surprised to find the gym had closed without notice, and that Defendants have continued billing consumers despite this. *Id*.

Pursuant to an eviction proceeding, Performax was ordered to vacate its premises on June 16, 2016. Blaylock Decl. ¶12. Additionally, pursuant to an action by a secured creditor, the equipment in use at Performax was made subject to a writ of replevin made permanent on July 19, 2016. Blaylock Decl. ¶21. Defendants were party to these proceedings and either knew or had reason to know of the impact on consumers. In the face of this knowledge, Defendants offered consumers no notice of the closure, and continued billing consumers after it occurred. Blaylock Decl., ¶¶25-32, Att. J, Att. A; Heward Decl., ¶¶20, 25-27. In these ways, Defendants' conduct has served to both "unfairly surprise" and "oppress" consumers.

iv. DEFENDANTS VIOLATED SECTION 5 OF THE HSSPA BY FAILING TO NOTIFY THE DIVISION OF CLOSURE

Section 5 of the HSSPA requires that "[i]f a health spa ceases operation or relocates and fails to offer an alternative location within five miles, the health spa shall provide the division with 45 days prior notice." Utah Code Ann. § 13-23-5(7).

The gym closed on or about June 24, 2016. The Division was first notified of the facility's closure on June 28, 2016, by a consumer who contacted the Division for information on how to cancel her contract with Performax. Heward Decl., ¶5. Defendants have not offered

consumers an alternative location within five miles of the gym and did not notify the Division in advance of its closure. Heward Decl., ¶9.

v. DEFENDANTS VIOLATION HSSPA RULES BY FAILING TO REFUND CONSUMER FEES, PROVIDE CONTRACTS, AND NOTIFY CUSTOMERS

The Fifth Cause of Action springs from violations of three provisions of Utah Admin. Rule R152-23-7, which establishes a mandatory procedure regulating the closure of a health spa. This rule was promulgated under authority granted by Utah Code Ann. § 13-2-5, which also authorizes the Director to take "judicial action against persons in violation of the division rules and the laws administered and enforced by [the Division]." The three violations alleged in the Fifth Cause of Action relate to one another, but are independent violations of the Act, and are analyzed as such.

Utah Admin. Rule R152-23-7(1).

Utah Admin. Rule R152-23-7(1) requires that a health spa which ceases operations "while having outstanding obligations to provide health spa services to consumers… shall, after obtaining the Division's approval, immediately refund the unused portion of all fees, including the proration of any fees paid up front."

To date, the Division has received 198 consumer complaints against Performax, representing a fraction of the 1,500 to 3,000 active memberships the Division estimates Performax had at closure. Not only have Defendants violated Utah Admin. Rule R152-23-7(1) by failing to refund fees to consumers with the Division's approval, Defendants have neither initiated refunds nor sought the approval of the Division for any sort of plan to do so. Blaylock Decl., ¶¶10, 18; Heward Decl., ¶20.

Because of Defendants' repeated failures to provide information to the Division, as required by statute, as requested by letter, and as insisted upon by subpoena, the Division is not presently able to determine the number and identities of affected consumers or the amounts of money they may be owed by Defendants. Utah Admin. Rule R152-23-7; Blaylock Decl., ¶34, Att. B, Att. C; Heward Decl., ¶¶29-30.

Utah Admin. Rule R152-23-7(2).

Utah Admin. Rule R152-23-7(2) requires that "[w]ithin ten (10) business days of the closure of its facility, the [closed] health spa shall provide the Division with a copy of each consumer contract that was valid on the date of closure."

At the time of Performax's most recent registration renewal with the Division, filed September 29, 2015, Performax reported 1,722 active consumer contracts, and the Division estimates Performax had 1,500 to 3,000 active consumer contracts at the time of closure. Blaylock Decl., ¶32, Att. A, p.6; Heward Decl., ¶27. To date, Defendants have not provided any consumer contracts to the Division, despite the statutory requirement, a letter, and a subpoena. Blaylock Decl., ¶¶ 14, 34, Att. B, C; Heward Decl., ¶29.

Utah Admin. Rule R152-23-7(6).

Utah Admin. Rule R152-23-7(6) requires that "[w]ithin thirty (30) days prior to closing, the health spa shall notify consumers of the closure in writing and set forth what actions the health spa plans to take in regards to transfers, cancellations or refunds."

The gym closed on or about June 24, 2016. Defendants did not provide consumers any advance notice of the facility's closure. Blaylock Decl., ¶¶25-32, Att. J, Att. A; Heward Decl., ¶¶20, 25-27.

vi. DEFENDANTS VIOLATED THE HSSPA RULES BY CONTINUING TO OFFER AND ENTER INTO CONTRACTS DURING THE 45 DAYS BEFORE CLOSURE

Utah Admin. Rule R152-23-7 requires that a health spa notify the Division prior to ceasing operations, and provides that once a health spa has done so, "it may not offer, sell or attempt to sell, solicit the sale of, or become a party to any new contracts to provide health spa services within forty-five (45) days preceding the anticipated date of closure." Utah Admin. Rule R152-23-7(7). This rule was promulgated under authority granted by Utah Code Ann. § 13-2-5, which also authorizes the Director to take "judicial action against persons in violation of the division rules and the laws administered and enforced by [the Division]."

Among the consumer complaints received by the Division in this matter are at least two from consumers with whom Defendants entered into "new contracts to provide health spa services within forty-five days preceding the date of closure." Blaylock Decl. ¶25, Att. K; Utah Admin. Rule R152-23-7(7). One such contract was entered on June 9, 2016, fifteen days before the gym was closed. Blaylock Decl. Att. K. The other such contract was entered June 13, 2016, a mere nine days before the gym was closed. *Id*.

vii. DEFENDANTS VIOLATED CSPA BY FAILING TO RESPOND TO THE DIVISION'S SUBPOENA

Subpoena Enforcement Under the CSPA

The CSPA provides that when the Division has reason to believe, whether based on its own inquiry or based on a consumer complaint, that a person has violated the CSPA, the Division may "subpoena witnesses or matter, and collect evidence." Utah Code Ann. § 13-11-16(1). The CSPA further provides that "[u]pon a failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may

apply to the court for an order compelling compliance." Utah Code Ann. § 13-11-16(3).

Non-Judicial Subpoena Enforcement Under the Judicial Code

Utah Code Ann. § 78B-6-313 provides that if a person or entity "with the authority to compel [] the production of documents issues a subpoena and the person to whom the subpoena is issued refuses to [] produce the documents ordered, the person shall be considered in contempt." On such refusal, the person or entity which issued the subpoena may raise the issue before a "judge of the district court [who may] then issue [an] order to show cause to compel the person's appearance." *Id*. (1)-(2).

On June 28, 2016, the Division received a complaint that the gym had closed, but that Defendants continued to bill membership customers regardless. Heward Decl. ¶5. Based on this complaint and on the Division's subsequent investigation the Division determined there was reason to believe violations of the CSPA had occurred. Blaylock Decl. ¶¶5-12 (¶12 notes "a determination that Performax was not in compliance with the closure or change of ownership requirements under the [HSSPA]"); Heward Decl. ¶¶5-8.

On June 28, 2016, the Division served subpoenas in this matter on Performax Gyms, Inc., by fax to (801) 825-3636, and by certified mail to its address at 1645 East Highway 193, Layton, UT 84040, and to its Registered Agent Hall at 1902 South Kay Drive, Kaysville, UT 84037, and to National Fitness Financial at 1645 East Highway 193, Layton, UT 84040. Blaylock Decl. ¶14, Att. C. These subpoenas commanded the production of gym membership records for all Performax members as of June 1, 2016, to include contact information, contracts, and billing information, no later than July 30, 2016, at 5:00 PM. Blaylock Decl. ¶ 14, Att. C.

On July 27, 2016, the Division issued a Cease and Desist letter sent to all known relevant

addresses, noting that Defendants had not responded to the subpoena, and that it is unlawful to fail to respond to a subpoena. Blaylock Decl. ¶22, Att. G. July 30, 2016, has come and gone with no response to the subpoena from Defendants or from National Fitness Financial. Blaylock Decl. ¶34.

The Division issued lawful subpoenas to which Defendants and National Fitness Finance have offered no response.

B. THE DIVISION AND THE CONSUMERS IT SEEKS TO PROTECT WILL SUFFER IRREPARABLE HARM UNLESS THE PRELIMINARY RELIEF IS GRANTED

With respect to Causes of Action One through Six the relief the Division seeks is authorized by statutory authority which provides for injunctive relief to prevent violations of the CSPA and the HSSPA. Where a plaintiff brings an action for an injunction based on violation of a statute which expressly offers injunctive relief as a remedy,

> it is not necessary that the [plaintiffs] show that they will suffer irreparable harm if the injunction is denied. When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.

Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981) (injunction granted on appeal to private plaintiff, as against multiple county governments); *see also Skybiz.com, Inc.*, No. 01-cv-396-K(E), 2001 WL 1673645, at *8 (Under the standard applied to the FTC in obtaining a temporary restraining order or preliminary injunction, "it is not necessary for the FTC to demonstrate irreparable injury.").

Notwithstanding precedent which suggests the Division need not prove irreparable injury, the facts of this case allow for such a showing. "Irreparable harm" that would justify preliminary

relief "includes '[w]rongs of a repeated and continuing character", and is not limited to injuries that cannot adequately be compensated in damages or for which damages cannot be compensable in money. *Hunsaker v. Kersh*, 1999 UT 106, ¶¶ 8 and 9, 991 P.2d 67 (internal citations omitted) (holding that the district court erred in defining "irreparable harm" too narrowly and in refusing to consider evidence respecting the extent and nature of alleged harm to a property from a neighbor interfering with the flow of irrigation water). A preliminary injunction is "an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one." *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983) (quoting *Anderson v. Granite Sch. Dist*., 17 Utah 2d 405, 407, 413 P.2d 597, 599 (1966)).

The Division has received at least 198 complaints from impacted consumers, of 1,500-3,000 the Division believes may exist. Here, Defendants' failure to produce records, as required of them by both statute and subpoena, has left the Division unable to identify or contact all aggrieved consumers, or calculate the harm Defendants have done. Blaylock Decl. ¶34; Heward Decl. ¶29. And it appears as though the harm to consumers is continuing each day, as new and existing customers pay for services they will never receive. Additionally, at least eight of the complainants have received past-due billing notices from Defendants' third-party billing process company, requesting payment for Performax dues owed after the gym's closure. Consumers expressed concern they would be sent to collections for disputing the charges or stopping billing. Blaylock Decl. ¶26, Att. L.

The wrongs of the Defendants are therefore repeated, continuing, and have the potential to affect consumer credit ratings. The potential effect on the consumer's credit ratings is particularly difficult to calculate, and it may not be possible to make those consumers whole by

monetary compensation. The Division seeks the preliminary relief primarily to put an end to the Defendants' wrongful conduct which is currently causing irreparable harm to consumers.

B. THE THREATENED INJURY TO THE DIVISION AND THE CONSUMERS IT SEEKS TO PROTECT OUTWEIGHTS WHATEVER DAMAGE THE PROPOSED ORDER OR INJUNUCTION MAY CAUSE TO DEFENDANTS[3]

At least 198 consumers have complained to the Division that, among other things they have been billed by Defendants since the gym closed, of as many as many as 1,500-3,000 impacted consumers the Division believes may exist. The threatened injury to these consumers is the continuation of billing by Defendants for services Defendants are not furnishing, and possible harm to the consumers' credit ratings. Further, Defendants' failure to produce consumer contact information and contracts to the Division has left the Division unable to identify or contact aggrieved consumers, or calculate the harm Defendants have done, and results in the Division's receipt of new consumer complaints. Blaylock Decl. ¶34; Heward Decl. ¶29.

The above-described continuing and threatened injury to new and existing consumers is monumental in size compared to the potential damage to the Defendants. The relief sought by the Division would essentially shut-down Defendants business operations, and require them to maintain and preserve records. The business operations (with the unfortunate exception of billing services) have been shut-down anyway since June 24, 2016.

Insofar as the relief sought here would require Defendants to comply with the CSPA and the HSSPA, including by retaining and producing documents, it cannot be taken to damage them. Equitable relief requiring that Defendants' website be taken down, or updated to reflect the state

3 When the government is a party, the public interest and the balance – of – the – equities factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir.), *cert. denied*, 134 S. Ct. 2877, 189 L. Ed. 2d 836 (2014); see also *K.G. ex rel. Garrido v. Dudek*, 839 F. Supp. 2d 1254, 1260 (S.D. Fla. 2011).

of their business, does no damage; a lost ability to offer and sell services a supplier cannot furnish is not damage, it is compliance.

With respect to the asset freeze for the purpose of preserving Defendants' resources for reimbursement of aggrieved consumers, it is entirely relevant that, "in considering the potential harm to a non-movant, a court may discount potential harm that would arise due to the actions of the non-movant." *Telestrata, LLC v. NetTALK.com, Inc.*, 126 F. Supp. 3d 1344, 1355 (S.D. Fla. 2015); see also *Perfetti Van Melle USA v. Cadbury Adams USA LLC*, 732 F. Supp. 2d 712, 726 (E.D. Ky. 2010). Any damage Defendants might experience as a result of an asset freeze is entirely self-induced, and, so, not entitled to consideration by the Court.

C. IF ISSUED, THE PRELIMINARY RELIEF WOULD NOT BE ADVERSE TO THE PUBLIC INTEREST[4]

It has been noted that "[t]he 'public interest' inquiry examines the effect of a proposed restraining order on nonparties rather than on the parties." *Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1198 (D.N.M. 2011). By this simple standard, the relief sought in this matter is not adverse to the public interest. Phrased more accurately in the present context, the relief sought in this matter is squarely *in the public interest*. As recently as August 8, 2016, forty-five days after the gym closed, Performax was still offering and selling memberships on its website. Blaylock Decl. ¶24, Att. I. The Division has already received complaints from 198 consumers, complaining that they have been billed since the Gym closed. Blaylock Decl. ¶25; Heward Decl. ¶25. The effect of the relief here sought would inure entirely to the benefit of current and prospective Performax customers, thus serving the public interest.

4 When the government is a party, the public interest and the balance – of – the – equities factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir.), *cert. denied*, 134 S. Ct. 2877, 189 L. Ed. 2d 836 (2014); see also *K.G. ex rel. Garrido v. Dudek*, 839 F. Supp. 2d 1254, 1260 (S.D. Fla. 2011).

More broadly, it has also been noted that

> [t]he 'public interest' factor frequently invites the court to indulge in broad observations about conduct that is generally recognizable as costly or injurious. *Id.* However, there are more concrete considerations, such as reference to the purposes and interests any underlying legislation was intended to serve, a preference for enjoining inequitable conduct, and the public's interest in minimizing unnecessary costs to be met from public coffers.

Prudential Ins. Co. of Am. v. Inlay, 728 F. Supp. 2d 1022, 1032 (N.D. Iowa 2010). Defendants' conduct is "generally recognizable as costly or injurious," by at least the 198 complainants and the Division. But, as *Prudential* notes, there are more definite considerations. *Id*. The CSPA expressly provides that it should be "construed liberally" to protect consumers, and the HSSPA requires a bond from health spas, in addition to imposing requirements regarding registration, operation, and a procedure for closure that are all intended to address precisely the kind of conduct in which Defendants are alleged to have engaged. Utah Code Ann. § 13-11-2(2); § 13-23-1, *et seq*. Further, Defendants failure, or refusal, to provide the Division with consumer information and contracts, and to obey the mandatory closure procedure more generally, have, and increasingly continue to, increase "unnecessary costs to be met from public coffers." Blaylock Decl. ¶¶14, 34; *Prudential*. 728 F.Supp. 2d at 1032.

By any method of consideration, the order of injunction, if issued, would serve to benefit and protect the public.

III. IMMEDIATE SUSPENSION OF BILLING SERVICES, AS WELL AS A COMPLETE ASSET FREEZE IS NECESSARY TO STOP THE ONGOING HARM TO CONSUMERS AND TO PRESERVE ASSETS

Because the Defendants continue to bill their customers for services that are no longer provided, and then initiate collection efforts, immediate suspension of billing services is necessary. Performax ceased operations on June 24, 2016. Despite its closure, Performax has

continued to bill new and existing members for monthly membership dues, personal training services, and semi-annual membership fees. Consumer losses are ongoing and are estimated to be in excess of $100,000. Additionally, an asset freeze is necessary to preserve the possibility of restitution for victimized consumers. Due to the lack of communication from the Defendants, and their continued billing of consumers, the Division is concerned and suspects that the Defendants are removing, concealing, or disposing of their assets to the detriment of consumers. An order freezing assets is appropriate to ensure that sufficient funds are available to satisfy any final judgment the Court might enter against Defendants and to ensure a fair distribution to consumers.

CONCLUSION

Because the Division is likely to succeed on the merits, having shown that the Defendants, who have ignored the Division and their customers, and continued to bill new and existing customers for services they no longer provide, the Court should grant the Division's application for preliminary relief.

Respectfully submitted this 12th day of August, 2016,

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